March 5, 1998

Adarand, ISTEA & the McConnell Amendment

The McConnell amendment is likely to come to the floor today. **The genius of the amendment is that it does precisely what most Americans — probably including most Members of the Senate and the House — think the original disadvantaged business enterprise (DBE) program did *and* what a properly designed "affirmative action" program should do — namely, to give targeted help to individuals in struggling small businesses without regard to their ethnicity or skin color or sex.**

Adarand Constructors' 1989 bid on a federal highway project was rejected solely because of its owner's race and gender. The contract was given to a firm that was controlled by a "socially and economically disadvantaged" person. The relevant federal law *presumes* that *every* member of some racial minority groups and *all* women are socially and economically disadvantaged.

Adarand sued the United States Department of Transportation and eventually won a major victory in the **United States Supreme Court which held that racial classifications, even if authorized by Congress, *"must serve a compelling governmental interest"* and *"be narrowly tailored to further that interest."*** [1] This is the *highest standard* in the Court's equal protection jurisprudence. The High Court sent the case back to the lower courts to determine if the federal highway law met that high constitutional test.

On remand,[2] **Judge Kane of the United States District Court for the District of Colorado held unconstitutional the following four provisions of federal law (and their implementing regulations) because they are <u>not</u> *narrowly tailored* to serve a compelling governmental interest:**

- Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA-one"),[3] **a provision of law that in its relevant provisions is identical to §1111 of "ISTEA-two" which is now being debated on the Senate floor (S. 1173).**

- Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA).[4] **STURAA is the predecessor to ISTEA, and it contained a provision that was similar to the current ISTEA language.** (The original *Adarand* lawsuit was based on STURAA inasmuch as "ISTEA-one" was not enacted until *after* Adarand Constructors had been denied the contract that prompted its lawsuit.)

- Section 8(d) of the Small Business Act (SBA).[5] **Section 1111 of the pending bill incorporates a key definition from §8(d)** (see paragraph 1111(b)(2) of S. 1173).

- Section 15(g) of the Small Business Act.[6]

The case is on appeal to the Tenth Circuit but no decision is expected before late next year. Congress, on the other hand, is addressing "ISTEA-two" now.

Notwithstanding the **decisions in the *Adarand* cases, the Senate Committee on Environment and Public Works proposes to "continue[] current law regarding the disadvantaged business enterprise (DBE) program"** because "the Supreme Court did not strike down the DBE program" and the "Department of Transportation has determined that the constitutional concerns can be addressed through changes in the Department's regulations" that will (1) "giv[e] priority to race-neutral measures in meeting program goals, and (2) limit[] the potential adverse effects of the program on other parties."[7]

Senator McConnell, on the other hand, proposes to replace the current race- and gender-based DBE program with an Emerging Business Enterprise Program that will provide expanded opportunities to all emerging small businesses without resorting to set-asides or preferences. Indeed, the McConnell amendment forbids discrimination and preferential treatment on the basis of race, color, national origin, or sex.

The current DBE program[8] (which is duplicated in the pending bill[9]) provides that (unless the Secretary of Transportation determines otherwise) "not less than 10 percent of the amounts" made available under the relevant parts of the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." By its own terms, the current DBE program does not appear to draw invidious lines between races or sexes; but (of course), there is more to the law than the part just quoted. **Under current law, the term "socially and economically disadvantaged individuals" presumptively means —**

- all Black Americans,
- all Hispanic Americans,
- all Native Americans,
- all Asian Pacific Americans,
- other groups or individuals certified by the Small Business Administration,[10] and
- all women.[11]

It is difficult to see how the Department of Transportation, which opposes the *Adarand* results,[12] can take the current language and construe it to meet the constitutional requirement that it be "narrowly tailored" to "serve a compelling governmental interest." **The current language sweeps broadly, making generalizations based on race. That is why the district court found it "overinclusive." At the same time, the current language excludes individuals who are genuinely socially or economically disadvantaged but do not fall within the specified racial and gender categories. That is why the district court found it "underinclusive."**

The McConnell amendment abandons racial and sexual categories so as to provide assistance to *individuals* based on *that individual's* economic situation. What is relevant is an individual's gross receipts, length of time in business, and willingness to participate in this new program. What is not relevant is that individual's race, ethnicity, or sex.

Endnotes

1. *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

2. *Adarand Constructors v. Pena*, 965 F. Supp. 1556, 1584 (D. Colo. 1997).

3. Pub. L. 102-240, title I, §1003(b), signed Dec. 18, 1991, 105 Stat. 1914, 1919, 23 U.S.C. §101 note (1994 ed.).

4. Pub. L. 100-17, title I, §106(c), signed April 2, 1987, 101 Stat. 132, 145.

5. 15 U.S.C. §637(d) (1994 ed.).

6. 15 U.S.C. §644(g) (1994 ed.).

7. S. Rept. No. 105-95 at 15-16. The Department of Transportation made recommendations at 62 *Federal Register* 29548 (May 30, 1997) (Supplemental Notice of Proposed Rulemaking with respect to participation by disadvantaged business enterprises (DBEs) in DOT programs and activities). See also, 62 *Federal Register* 38952 (July 21, 1997) (extension of comment period).

8. §1003(b)(1) of "ISTEA-one" (1991), *supra* n. 3.

9. §1111(a) of "ISTEA-two" (1998 pending), S. 1173, 105th Congress, 1st Sess. (reported with amendments from the Comm. on Environment & Public Works on Oct. 1, 1997).

10. See, *Adarand Constructors v. Pena*, *supra* n. 2, at 1565 (describing the racial & ethnic classes that are covered under the DBE program).

11. See, §1003(b)(2)(B) of "ISTEA-one" (1991), *supra* n. 3.

12. The U.S. Department of Transportation was the defendant-respondent at the Supreme Court, where it lost. It was the defendant in the district court on remand, where it lost again, and it is appealing that latest loss. It tried to intervene in a case involving Adarand and the State of Colorado, and Judge Kane accused it of "flagrantly ignor[ing]" his recent ruling in *Adarand Constructors v. Pena*, 965 F. Supp. 1556, the chief case involving USDOT (decided on June 2, 1997). *Adarand Constructors v. Romer*, 174 F.R.D. 100, 103, 1997 U.S. Dist. LEXIS 10242, **8 (decided July 14, 1997) (denying USDOT's request for intervention in the *Romer* case). See also, letter to Sen. Mitch McConnell from Prof. George R. La Noue (Oct. 17, 1997) ("The proposed [DoJ] regulations are either irrelevant or incomplete to the major requirements of narrowly tailoring and they do not begin to supply a compelling basis for the use of preferences.").

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